operated as a fraud upon the appellant. Relying upon the promises and assurances given by Gibson that the notes were all right and that he would pay them, appellant took no action to enforce its indebtedness against Charles, and without any notice whatever to appellant Gibson permitted the stock of goods to be withdrawn by Charles, so that the latter could and did put them beyond the reach of appellant by conveying title thereto and transferring the possession thereof to a trustee for the benefit of the creditors of Charles other than appellant.

Ignorance of the law could not avail Gibson, and to permit him, under the facts and circumstances appearing in the record, to retract his assurances to appellant with reference to the two notes in question, or to repudiate his express promise to pay them, would operate, in our opinion, as a fraud upon the rights of appellant, and be, not only contrary to the established law, but to the "plainest principles of natural justice. Stebbins *v.* Bruce, *supra;* 2 Min. Inst. 326; 1 Greenleaf on Ev. (15th Ed.) § 207; 2 Pom. Eq. (3d Ed.) § 812.

For these reasons we are of opinion that the decree of the circuit court, in so far as it holds that the appellant is not entitled to recover of the appellee, B. G. Gibson, the two notes, of $300 each, executed by Gibson to Paris Charles and by the latter assigned to appellant, is erroneous; and we are further of opinion that appellant is entitled to a lien on the tract of land conveyed by Gibson to his wife by deed of July 15, 1904, for the amount of said notes, with interest thereon from their maturity, as well as the lien for the sum of $235.77, with interest thereon from the 30th day of July, 1904, until paid, with the costs of this suit, as decreed by the circuit court. Therefore the said decree, to the extent that it denies appellant the right to recover of Gibson the amount of said notes and a lien upon said land as security for their payment, will be reversed and annulled, and the cause remanded to the circuit court to be further proceeded with in accordance with this opinion.

Reversed in part.

SOUTHERN RY. CO. *v.* SMITH.

Nov. 21, 1907.

[59 S. E. 372.]

1. **Master and Servant—Injuries to Servant—Constitutional Provision—Abolishing Fellow Servant Doctrine—Construction.**—A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine at the time he was thrown therefrom was the usual and proper place for him to be, is an em-

ployee "engaged in service requiring his presence" on an engine within Const. § 162, abolishing as to such an employee the doctrine of fellow servant so far as it affects the employer's liability for injuries to the employee resulting from another employee's acts or omissions, and authorizing a recovery for injury due to the act or omission of a co-employee in another department or in charge of a switch, signal point, or engine; that section not being limited to an employee actually engaged in the operation of the engine, but extending to others present in the reasonable and proper discharge of their duties.

2. Same—"Fellow Servants"—Who Are.—All serving a common master working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, though in different grades or departments, are fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486-492.

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

3. Same.—A yard foreman who had no authority over a yard engineer, except to direct him when and where to move his engine, and who did not have the right of employment or discharge of the engineer, was not a vice principal as to such engineer, but a fellow servant, within Const. § 162, abolishing the doctrine of fellow servant so far as it affects the employer's liability for injuries to the employee resulting from another employee's acts or omissions as to every employee engaged in any service requiring his presence on a train, car, or engine, and authorizing a recovery by such an employee for injury due to the act or omission of a co-employee in another department or in charge of a switch, signal point, or engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493-514.]

4. Writ of Error—Review—Amount of Damages.—A verdict for $15,000 for the loss of an arm by a yard foreman will not be disturbed as excessive where there is nothing else to suggest that the jury was influenced by prejudice or acted under any misconception of the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947; vol. 15, Damages, § 379.]

5. Same.—The Supreme Court will not disturb a verdict in a personal injury action as excessive, unless the damages are such as to warrant the belief that the jury must have been influenced by prejudice or misled by some mistaken view of the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947.]

Error from Circuit Court, Amherst County.

Action by N. J. Smith against the Southern Railway Com-

pany. Judgment for plaintiff, and defendant brings error. Affirmed.

Horsley, Kemp & Easley, for plaintiff in error.
Lee & Howard, for defendant in error.

HARRISON, J. This writ of error brings up for review the proceedings in an action, brought by the defendant in error, to recover damages for a personal injury alleged to have been occasioned him by the negligence of the plaintiff in error. There was a verdict and judgment in favor of the plaintiff for $15,000, which we are asked to reverse and set aside.

The essential facts established by the record are that the plaintiff was in the employment of the defendant railroad company as yard foreman and station agent at Monroe, a division terminal in Amherst county. His duties required him to superintend generally the operations in the yard, and among other things to go from point to point therein, switching cars, making up trains, and getting them in and out of the yard. In the discharge of these constantly recurring duties in an extensive yard, it was customary and necessary for the plaintiff to ride from point to point on the switching engine. He had been engaged with duties of this character on the evening of the accident, and was returning from the performance of his work in the direction of the yard office, standing, as was his custom, on the step of the engine, holding to the handholes placed there for the purpose with both hands. The position of the plaintiff on the step of the engine was within two feet of the engineman, who was then and there directed by the plaintiff as to the next point to take the engine, and further told to slow up as he passed the office, in order that the plaintiff might get off for the purpose of discharging certain duties there that demanded his attention. As the office was approached, the engineman, with full knowledge of the plaintiff's position, applied the steam in such manner as to cause the engine to suddenly and violently lunge forward, in an unusual and dangerous manner, thereby throwing the plaintiff to the ground and under the wheels of the engine, which crushed and destroyed his arm.

We are of opinion that the negligence of the defendant company is clearly established, and that the evidence is quite sufficient to justify the conclusion of the jury that the plaintiff was not guilty of contributory negligence.

The assignment of error chiefly relied on involves the relation existing at the time of the accident between the plaintiff and the engineer. The theory of the plaintiff, which was adopted by the trial court, is that at the time of the commission of the negligent act complained of he was a fellow servant of the engineer, with the same right to recover of the defendant that he

would have had if such negligent act had been that of the defendant company itself in the performance of a nonassignable duty; it being insisted on behalf of the plaintiff that he comes within the provisions of section 162 of the Constitution, which abolishes the doctrine of fellow servant as to certain classes of railroad employees, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master. The contention of the defendant company is that the presence of the plaintiff on the engine was not required by the services in which he was engaged when injured, and therefore that the company is not liable, although the injury was inflicted by the negligence of the engineer. It is further contended, on behalf of the railway company, that the plaintiff was not a fellow servant of the engineer, but that, as yard foreman and station agent, he occupied the master's position as to the engineer, who was an inferior servant; and that as such vice principal, claiming for injury from his subordinate's act, the defense of assumed risk is not intended to be touched by section 162 of the Constitution.

Omitting such parts of section 162 of the Constitution as do not apply to this case, it reads as follows: "The doctrine of fellow servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is * * * abolished as to every employee engaged * * * in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master that a servant would have * * * if such acts or omissions were those of the master himself, in the performance of a nonassignable duty provided the injury so suffered by such railroad employee result from the negligence of * * * a co-employee engaged in another department of labor * * * or who is in charge of any switch, signal point, or locomotive engine."

The language, "every employee engaged * * * in any service requiring his presence on a train, car or engine," manifestly means every one who may be there in the line of duty. We cannot pick out the single word "requiring," and attach to it the restrictive meaning contended for by the railway company. This would exclude from the benefits of the constitutional provision every employee except those actually engaged in the operation of the engine, although the presence there of some other might be in the line of a reasonable and proper discharge of his duty. If his presence on the engine is in the usual and proper discharge of his duty, he is rightfully there, and is entitled to the benefit of the protection afforded him by the Constitution.

Looked at from the standpoint of a demurrer to the evidence, as this record must be, the undisputed facts are that the duties of the yard foreman required him to accompany and ride upon the yard engine from one point to another in the yard; that it was both proper and customary for him to ride on the engine as he was doing at the time of the accident; that his position on the step of the engine was, not only a reasonably safe place, but that it was the place at which it was usual, customary, and proper for him to be. There is no denial that the plaintiff had so interpreted the requirements of his position for years, and it does not appear that the railway company expected such duties to be discharged in any other way.

As to the contention that the yard foreman and the engineer were not fellow servants under the law as it was prior to the date on which the Constitution of 1902 became effective, it clearly appears that the yard foreman had no authority or power over the yard engineer, except to direct him when and where to move his engine in shifting and transferring cars on the yard. He possessed none of the power of a vice principal, such as the right of selection, employment, or discharge of the engineer, or any authority over him in the operation of the engine. He could only direct his movements on the yard as any other foreman or boss could do. If the engineer disobeyed or was for reason unsatisfactory, the yard master could only report him to a common superintendent for his action.

All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades, or departments, are fellow servants, and take the risk of each other's negligence. N. & W. Ry. Co. *v.* Donnelly's Adm'r, 88 Va. 853, 14 S. E. 692.

In the case of N. & W. Ry. Co. *v.* Nuckol's Adm'r, 91 Va. 207, 21 S. E. 347, the principle in succinctly stated as follows: "The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is: Were the departments so far separated from each other as to exclude the probability of contract and of danger from the negligent performance of their duties by employees of the different departments. If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent peformance of the duties of his fellow servant in such other department. The liability does not depend upon graduations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal."

In the case of Richmond Locomotive Works *v.* Ford, 94 Va. 643, 27 S. E. 511, this court says: "Where the execution of work

directed to be done by the master or his representative is entrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service, as has been said, is so essential and no universal that every workman in entering upon a contract of service must complete its being made in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of any other fellow workman. The foreman or superior servant stands to him in that respect in the precise position of his other fellow servant."

In the case of N. & W. Ry. Co. *v.* Houchins, 95 Va. 404, 28 S. E. 580 (46 L. R. A. 359, 64 Am. St. Rep. 791) this court says: And the mere fact that another engaged in the same work or employment is, by the rules of the master for the direction and government of those in his employ, made a leader, boss, or conductor, or by whatever name he might be designated or known, to see to the execution of the work, and by the neglect of this leader, boss, or conductor one engaged in the same common work of the master is injured, does not of itself place the one so put in authority in the category of principal or vice principal." And again, on page 406 of 95 Va., page 581 of 28 S. E. (46 L. R. A. 359, 64 Am. St. Rep. 791), it is said: "The running of trains by a railroad company is work of such a character as to make it essential that one of the crew of each train be selected as a leader, boss, or conductor, as he is always known, to direct the execution of the work, and this kind of superiority, it may be said, is as essential and universal in the moving of trains upon a railroad as in other pursuits when the employees work in squads, gangs, or crews. Every man in entering upon a contract of service upon a train as fireman, engineman, or brakeman must contemplate its being run under the orders and direction of a conductor, who, though designated as conductor, with authority to control and direct the men under him, is but a co-laborer, or coworkman, with the other members of the crew, engaged in a work of mere operation, a common employment, under one and the same common employer, from whom all derive their authority and compensation." See, also, Moore Line Co. *v.* Richardson's Adm'r, 95 Va. 326, 28 S. E. 384, 64 Am. St. Rep. 785; Eckle's Adm'x *v.* N. & W. Ry. Co., 96 Va. 69, 25 S. E. 545; Southern Ry. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285; Trigg Co. *v.* Lindsay, 101 Va. 193, 43 S. E. 349.

In view of the evidence in this case, and under the law as it was when the present Constitution became effective, as shown by the authorities cited, the relation existing between the yard foreman and the yard engineer in question was that of fellow servant.

The presence of the plaintiff in this case being, as we have seen, required upon the yard engine at the time of the accident, and the relation existing between himself and the engineer being that of fellow servants, he comes clearly within the protection afforded such an employee by the provisions of section 162 of the Constitution, which abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master. This provision of the Constitution makes no distinction between superior and inferior servants. The language is: "Abolished as to every employee of a railroad company engaged in any service requiring his presence upon an engine" and "every such employee shall have the same right to recover," etc.

These considerations dispose of the material questions raised by the exceptions taken to the action of the circuit court in giving and refusing instructions. The instructions given conform to the view of the law herein expressed, and submit the case to the jury without prejudice to the rights to the plaintiff in error.

It is further assigned as error that the verdict is excessive.

It is true that $15,000 is a larger verdict than we usually encounter as an award of damages for the loss of an arm; but this furnishes no warrant for our interference with the finding. The question to be considered is not whether this court, if acting in the place of the jury, would give more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, some gross error, or misconception of the subject. There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is therefore the established rule, settled by numerous decisions extending from Farish & Co. *v.* Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666, to the recent case of N. & W. Ry. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. The record in the case at bar furnishes no suggestion that the jury were influenced by partiality or prejudice, or by any misconception of the merits of the case; nor is there anything to indicate that they were not moved to their conclusion from a sense of right and justice.

The circuit court did not err in refusing to set the verdict aside, and its judgment must be affirmed.

Note.

Many of us prize our limbs as highly as we do our lives, and justly so, and would be unwilling to voluntarily part with any one

of them, much less an arm, at any price; but when the accident has occurred and liability has been fixed on the defendant, the question arises then what is a fair and adequate compensation for the plaintiff's loss, and it should be borne in mind that though the loss of an arm is serious, it dosn't materially impair the capacity of the unfortunate victim for many avocations. Here the plaintiff's arm was entirely destroyed, it is true, but there is nothing to show that he was otherwise maimed, nor is it shown that the negligence of the defendant was such as would have justified an award of exemplary damages. So we still have the man unimpaired except for the arm, with the usual earning capacity of one-arm men, and in addition nine hundred or a thousand dollars, the income on the amount of his recovery, less reasonable counsel fees.

It will be interesting to note what the courts in other jurisdictions have said about the excessiveness of verdicts in the case of loss of or injury to the members, because, as the court said in the principal case, "there is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation." The illustrative verdicts given below are confined in the main to cases in which the destroyed limb was an arm, as in the principal case.

$750 for mashing and breaking the arm of an employee while coupling cars is not excessive. Georgia Pac. R. Co. *v.* Weaver, 85 Ga. 869, 11 S. E. 614.

Two thousand and five hundred dollars was held excessive damages for death of a fireman resulting from the giving away of a bridge while he was riding on an engine passing over the bridge, where it is not clear that he was free from negligence in keeping his position while passing over the bridge, and it appeared that he was a very poor man dependent only on his wages as fireman, and his next of kin had no reasonable expectation of anticipated advantage if he had survived. Groff *v.* Cincinnati, etc., R. Co. (Ohio), 1 C. S. C. R. 264, 13 O. Dec. Reprint 540.

$3,000 for breaking the arm of a passenger by gross negligence is not excessive, where it appears that he was earning fourteen hundred dollars per annum and suffered great inconvenience and pain. Western, etc., R. Co. *v.* Drysdale, 51 Ga. 644.

In Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226, the plaintiff, a young able-bodied man, who depended wholly on manual labor for a livelihood, was allowed $3,500 damages for the loss of an arm.

In VanWinter *v.* Henry Co., 61 Iowa 684, $4,000 was held not excessive for the loss of an arm.

In Missouri Pacific R. Co. *v.* Texas Pacific R. Co., 41 Fed. 316, $4,500 was deemed not excessive for the loss of an arm.

Decedent was employed in managing the target and switch of a railway controlling the passage of trains from one track to another; he was fifty-two years of age and earned about forty dollars a month; he contributed to his family and the beneficiaries represented as plaintiffs. In a suit for his wrongful death from being run over by a train passing on the wrong track, it was held, that a verdict for more than $5,000 was excessive. Lake Shore, etc., R. Co. *v.* Schultz (Ohio), 19 O. C. C. 639, 9 O. C. D. 816.

In Little Rock, etc., R. Co. *v.* Cagle, 53 Ark. 347, $5,000 was held, not excessive for the loss of an arm.

A verdict of $5,200 for the death, by wrongful act, of a track walker earning one dollar and twenty-five cents per day, is excessive. Erie R. Co. *v.* McCormick (Ohio), 3 O. C. C., N. S. 652, 14 O. C. D. 86.

In New York, $6,500 was held to be not so excessive for the loss of an arm as would justify the court in setting aside the verdict. Bradenburg *v.* New York Central, etc., R. Co. (N. Y.), 58 Hun 607.

In Anglo-American Packing, etc., Co. *v.* Baier, 31 Ill. App. 653, $8,000 for the loss of a left arm and deafness in one ear was held not excessive.

In Missouri, etc., R. Co. *v.* Kirkland, 11 Tex. Civ. App. 528, $9,119 damages for the loss of an arm was allowed to stand.

In a carefully considered Georgia case, the court refused to disturb a verdict for $10,000 for the loss of an arm and the pain and suffering caused by the wanton expulsion of a trespasser from a running train. But as has been said, no wantonness nor willfulness appeared in the principal case, so part of the recovery in the above case was "smart money." Savannah, etc., R. Co. *v.* Godkin, 104 Ga. 655, 30 S. E. 378.

In Baltzer, 89 Wis. 257, $10,000 was held to be not so excessive for the loss of an arm as evinced passion or prejudice on the part of the jury.

$10,000 for dislocation of arm, burning of hand, and serious permanent injuries impairing the health and constitution of the plaintiff, and incapacitating him from securing remunerative employment, is not excessive. Brush Electric Light, etc., Co. *v.* Simonsohn, 107 Ga. 70, 32 S. E. 902.

In Ketchum *v.* Texas, etc., R. Co., 38 La. Ann. 777, $10,000 was held not excessive for the loss of an arm.

$13,750 for the loss of an arm by a ten-year-old boy, struck by a train while crossing a railroad at a street crossing, being extreme, if not excessive, the error of the court, in charging the jury as to the elements of damages in regard to which there was no evidence, is ground for granting a new trial. Western, etc., R. Co. *v.* Young, 83 Ga. 512, 10 S. E. 197.

In a case decided in the Pennsylvania county court, a verdict for $18,000 for the loss of an arm was allowed to stand. Musser *v.* Lancaster City Street R. Co., 15 Pa. Co. Ct. Rep. 430.

Where an employee of a railroad company, forty years of age, was earning an income varying from $50 to $110 per month at the time of his injury resulting from the negligence of the railroad company, it was held, that $30,000 was an excessive sum in damages though he was permanently disabled and had passed through much physical and mental suffering. Columbus, etc., R. Co. *v.* Shannon, 4 O. C. C. 449, 2 O. C. D. 644.

It will be seen that in no instance, but in the case decided by the Pennsylvania county court and cited above, has so large a verdict as this one been rendered merely for the loss of an arm, and while the sole fact that the court, if on the jury, would not have given so large an amount, is not the criterion, still it would seem that in the light of the verdict in the Ampey case, this verdict must be excessive, and the court might have presumed "passion or prejudice," and ordered a remittitur. It is difficult to imagine a "flagrantly excessive" verdict, if this is not one.

The true rule is that when the damages found by the jury, in an action of tort, are so great that it may reasonably be presumed that in estimating them the jury did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption, the court may set aside the verdict and award a new trial. Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189.

The Canadian Law Review gives an interesting account of excessive

verdicts that have been rendered by English juries in celebrated cases. It said: "The record verdict of £50,000 damages for libel obtained by Mr. Lever, M. P., against the Daily Mail recalls some verdicts for enormous sums obtained in the British Isles. In July, 1804, Curran appeared at the Ennis Assizes in the celebrated crim. con. case of Mr. Massey, a clergyman, against the Marquis of Headfort, and obtained the huge sum, as the value of money in those days rendered it, of £10,000 damages. In Feb., 1807, Valentine Lord Cloncurry, a noted figure in Irish public life for more than fifty years, was divorced from his wife by Act of Parliament owing to her mis conduct with Sir John Piers, from whom he recovered £20,000 damages. In 1893 Mr. Gatty obtained against the late Colonel Farquharson, M. P., damages for £5,000 in an action for libel and slander during the general election of 1892 in a contest in which Colonel Farquharson and Mr. Gatty were opponents. A feature of this trial was the examination on behalf of Mr. Gatty, as witnesses, of Mr. George Wyndham and Mr. St. John Brodrick (now Lord Midleton), who although opposed in politics to Mr. Gatty, bore testimony to his high character. In the Belt libel suit, which lasted forty-three days in the eighties of the last century, there was a verdict for the plaintiff of £5,000 damages. In the Constantinidi divorce case there were damages for £25,000; and the Times, after the Pigott exposure in 1889, published an abject apology for the 'fac-simile letter,' and stayed Mr. Parnell's action for libel by the payment of £5,000, which he accepted. So recently as 1896 the verdict obtained by Mrs. Kitson against Dr. Playfair for libel and slander for £12,000 created astonishment on account of the great amount of the damages."

See note appended to Burdick *v.* Missouri Pacific R. Co., 26 L. R. A. 384.

KLINE *v.* MILLER, ADM'R *et al.*

Nov. 21, 1907.

[59 S. E. 386.]

Vendor and Purchaser—Vendor's Lien—Satisfaction—Merger.—K. purchased an undivided moiety in the M. and B. tracts of land, executing five bonds for the unpaid price secured by a vendor's lien. Later K. purchased the other half of the tracts, defendant's intestate becoming surety for the unpaid portion of the price, which was also secured by a vendor's lien. K. conveyed this moiety to intestate, in trust to secure the price, and, being unable to pay for the M. tract, conveyed all the land to intestate for part cash and the residue in five annual installments secured by a vendor's lien on the land. Intestate then held the incumbrances on the B. tract, and, while his purchase money bonds for the M. tract were in excess of those liens, the bonds were not due. Thereafter intestate paid off for K. a bond for $910, and, after his death in a settlement, this amount was applied in payment of the deferred installments of purchase money on the M. tract, leaving undischarged the vendor's liens on the B. tract to the extent of the balance due from K. to intestate's estate. Held,